United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1226

To be argued by
JAMES E. NESLAND

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1226

UNITED STATES OF AMERICA,
Appellee,

—v.—

LUREIDA M. TORRES,
A Witness before the Grand Jury,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
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LAWRENCE B. PEDOWITZ,
Assistant United States Attorney, Of Counsel.

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Preliminary Statement

Lureida M. Torres appeals from an order entered on May 13, 1976, in the United States District Court for the Southern District of New York by the Honorable Charles L. Brieant, Jr., United States District Judge, adjudging her in civil contempt as a recalcitrant witness pursuant to Title 28, United States Code, Section 1826.

Statement of Facts

On January 8, 1976, Torres was served with a subpoena commanding her to appear on January 9, 1976 and testify before a Grand Jury sitting in the Southern District of New York. At the request of Torres' counsel, that appearance was twice adjourned to February 4, 1976, at which time Torres moved to quash the subpoena

asserting that the Government was misusing the Grand Jury to assist the Federal Bureau of Investigation in the apprehension of fugitives. Hearings were held on February 9, 1976 and March 3, 1976, before the Honorable Constance Baker Motley, United States District Judge. In connection with the proceedings before Judge Motley, the Government submitted, *in camera*, an affidavit explaining the reasons Torres' testimony was sought by the Grand Jury.* Torres motion to quash the subpoena was denied on March 3, 1976, and she was directed to appear and testify before the Grand Jury on that same date.**

Torres then appeared before the Grand Jury and declined to answer any questions beyond her name, address and employment asserting, *inter alia*, her Fifth Amendment privilege against self-incrimination. Upon her refusal to answer any questions, Torres was instructed to reappear before the Grand Jury on March 10, 1976. That appearance was later adjourned to April 21, 1976.

On April 21, 1976, prior to her reappearance before the Grand Jury, Torres was served with a new subpoena

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* The affidavit remains under seal and is, of course, available for scrutiny by this Court.

** Judge Motley denied Torres' motion to quash her subpoena finding that the Grand Jury had jurisdiction to investigate for possible violations of Title 18, United States Code, Section 1071, forbidding the harboring of fugitives. Although the subpoena originally issued to Torres had cited only to Title 18, United States Code, Section 1073, which makes it a federal crime to flee from local criminal charges, it was amended by consent to cite Section 1071 when the Government conceded at the hearings that the Grand Jury might well lack jurisdiction under Section 1073, since the fugitives which were one of the subjects of the Grand Jury's investigation were sought in connection with terrorist bombings of five hotels in San Juan, Puerto Rico.

principally citing statutory provisions forbidding use, transportation and possession of explosives. No objection was made to the new subpoena. Torres then appeared before the Grand Jury and was asked the following six questions:

> (1) Please identify to the Grand Jury any persons you know who were involved in the dynamite bombing in Manhattan of Fraunces Tavern on January 24, 1975, which resulted in the death of four of its patrons.
>
> (2) Please identify to the Grand Jury any persons you know who were involved in the dynamite bombings on October 26, 1974 in Manhattan of the Marine Midland Bank, 140 Broadway; Chemical Bank, 1251 Avenue of the Americas; Banco de Ponce, 10 Rockefeller Plaza; Lever House, 390 Park Avenue; and the Union Carbide Building, 270 Park Avenue.
>
> (3) Please identify to the Grand Jury any persons you know who were involved in the booby-trap bombing of New York City Police Officer Angel Poggi in Manhattan on December 11, 1974, which resulted in Officer Poggi losing one of his eyes.
>
> (4) Please identify to the Grand Jury any persons you know who were involved in the dynamite bombings in Manhattan on April 2, 1975 of Bankers Trust Co., 280 Park Avenue; Metropolitan Life Insurance Co., 25th Street and Park Avenue; and New York Life Insurance Co., 67 Madison Avenue.
>
> (5) Please identify to the Grand Jury any persons you know who were involved in the dynamite bombings in Manhattan on October 25, 1975 of National Westminster Bank, Ltd., 100 Wall Street; Chase Manhattan Bank, 23 East 57th

Street; First National City Bank, 111 Wall Street; First National City Bank, 40 West 57th Street; and the United States Mission to the United Nations, 799 1st Avenue.

(6) Please identify to the Grand Jury any persons you know who are members of or associated with the terrorist organization which calls itself the FALN, the Armed Forces of Puerto Rican National Liberation, and which has issued communiques claiming credit for all the bombings referred to in the previous questions.

Torres declined to answer each of the six questions, asserting again, *inter alia*, her Fifth Amendment privilege.

After Torres refused to answer these questions, she was instructed by the Grand Jury to appear before Judge Brieant. Upon the Government's formal application, Judge Brieant granted Torres immunity pursuant to Title 18, United States Code, Sections 6002-03. At the same time, Torres moved to have the Government disclose the existence of any electronic surveillance of the witness, and Judge Brieant ordered the Assistant United States Attorney in charge of the Grand Jury investigation to file an affidavit affirming or denying the existence of any electronic surveillance of the witness. The Assistant United States Attorney then filed later that same day an affidavit denying knowledge of any electronic surveillance, and Judge Brieant instructed Torres to reappear before the Grand Jury. She did so, but still refused to answer the six questions. She was then instructed to reappear before Judge Brieant. Each of the six questions were read to Judge Brieant, and he ordered her to reappear before the Grand Jury and answer them. Torres reappeared but persisted in her refusal to answer any of the questions.

On April 28, 1976, the Government formally moved pursuant to Title 28, United States Code, Section 1826 to have Torres adjudged in civil contempt as a recalcitrant witness. After hearings on May 6 and May 13, 1976, Judge Brieant found Torres had offered no just cause to refuse to answer the first five questions and ordered that she be confined until such time as she were willing to answer the questions, but not beyond the term of the Grand Jury, which expires on October 28, 1976.

Judge Brieant stayed the effective date of the order of confinement pending an appeal and decision by this Court.

ARGUMENT

POINT I

Torres has no First Amendment right to condition her willingness to testify before a Grand Jury upon an evidentiary showing by the Government that she possesses relevant testimony.

Torres seeks to justify her refusal to answer the questions before the Grand Jury by advancing the novel contention that the First Amendment should be interpreted by this Court to require the Government to make a preliminary evidentiary showing that she possesses information relevant to the Grand Jury's inquiries before she may be subpoenaed to testify and held in contempt for refusing to do so. This contention is specious.

The Supreme Court in *Blair* v. *United States*, 250 U.S. 273 (1919), fully discussed the historic function

of the Grand Jury and the rights, privileges and obligations of witnesses subpoenaed to testify before it. In the course of that discussion, Justice Pitney analyzed the function of the Grand Jury as follows:

> "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labor, not at the beginning. *Id.* at 282." *

In that same discussion, Justice Pitney made the following observation with respect to the Grand Jury's authority to call witnesses before it and the witnesses' obligations to testify:

> "In all of these provisions, as in the general law upon the subject, it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than

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* This precise excerpt was only recently quoted with approval in *United States* v. *Dionisio*, 410 U.S. 1, 13 n. 12 (1972) and in *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972). See also *Hale* v. *Henkel*, 201 U.S. 43, 65 (1906).

> that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty is onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government (*Wilson* v. *United States*, 221 U.S. 361, 372, quoting Lord Ellenborough) . . . ."

Accepting and imposing the procedure suggested by Torres would completely reverse the historic function of the Grand Jury recognized in *Blair* and would compel the Government to utilize the Grand Jury not to commence investigations and subpoena witnesses to seek evidence of possible criminal violations, but strictly to hear evidence of criminal violations already investigated by some other law enforcement agency. That is so because, otherwise, the Government could never make the kind of preliminary evidentiary showing Torres contends it should make before subpoenaing a witness to testify before it. No valid reason requires or commends such a radical departure from the Grand Jury's traditional investigatory role.

Recent case law confirms that the power of the Grand Jury to investigate and subpoena witnesses may be instigated by nothing more substantial than a tip or rumor. See *United States* v. *Dionisio*, 410 U.S. 1, 15 (1972); *Branzburg* v. *Hayes*, 408 U.S. 665, 701 (1972). The Supreme Court continues to acknowledge that "[a] grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find out if a crime has been committed.' *United States* v. *Stone*, 429 F.2d 138, 140 (CA2 1970)." *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 701.

Indeed, in *Branzburg*, the Supreme Court completely rejected a claim by newsmen that an unqualified First Amendment privilege should be granted to them to refuse to disclose to a Grand Jury their sources of information about criminal activities. The Court similarly declined to fashion an alternative procedure, such as is suggested by Torres here, conditioning a newsman's testimony upon some preliminary showing that they possessed relevant testimony not otherwise available. Outlining broadly the obstructions which such a preliminary showing would interpose on the Grand Jury's lawful investigations, the Court stated:

> "In each instance where a reporter is subpoenaed to testify, the courts would . . . be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter's appearance: Is there probable cause to believe a crime has been committed? Is it likely that the reporter has useful information gained in confidence? Could the grand jury obtain the information elsewhere? Is the official interest sufficient to outweigh the claimed privilege?" *Id.* at 705.

Precisely the same kind of delays and impediments would arise were the Court to adopt the procedure suggested by Torres.

Moreover, it is clear that a procedure requiring a preliminary factual showing before a witness could be required to testify would result in a variety of improvident disclosures otherwise shielded by the secrecy surrounding Grand Jury proceedings. For example, in order to make such a preliminary showing the Government would be required to disclose in most instances some or all of its accumulated evidence and leads, thereby risking disclosure of its past and future witnesses.

Similarly, the Government might be obliged under this unprecedented procedure to make such a showing by disclosing the results, or expected results, of its intended questioning of a hostile witness, thus risking possible use by that witness of such disclosures to tailor or limit his testimony to the minimum consistent with the Government's preliminary showing. In the same vein, most significantly, such disclosures could easily serve to alert potential targets of the Grand Jury's investigation of their criminal activities.*

Torres argues that an exception nevertheless must be made in her case because, she claims, she was subpoenaed to testify before the grand jury solely because she was a member of the Puerto Rican Socialist party and an exponent of Puerto Rican political independence, and because, if she testifies "isolated from the presence and scrutiny of [her] associates," she will suffer the "loss of the trust and confidence of [her] political associates." (Br. at 6).** This argument is frivolous.

The only "factual support" for Torres' allegations that she was subpoenaed solely because of her belief in Puerto Rican independence were the averments of her counsel, Martin Stolar--averments made on nothing more than his own "information and belief." *** (Br. at v-vi). Aside from the inadequate showing made by Torres, this claim is totally undermined by an examination of the

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* It was precisely this risk that required the Government in February, 1976 to file an *ex parte* affidavit with Judge Motley disclosing the objectives then sought by the Grand Jury in subpoenaing Torres to testify before it.

** The abbreviation "Br." refers to Torres' brief.

*** Much of the purported factual support for Torres' contentions and allegations is derived from a lengthy affidavit filed on her behalf by Martin Stolar on May 13, 1976, who made the allegations on unspecified "information and belief."

questions propounded to Torres before the Grand Jury. None concerned her membership in the Puerto Rican Socialist party. None concerned her belief in political independence for Puerto Rico. Indeed, not one of the six questions concerned any subject other than the terrorist bombing activities of the FALN in Manhattan.

This is plainly, then, not a case where a Grand Jury is attempting "to invade protected First Amendment rights by forcing wholesale disclosure of names and organizational affiliations for a purpose that was not germane to the determination of whether crime has been committed, *cf. NAACP* v. *Alabama*, 357 U.S. 449 (1958); *NAACP* v. *Button*, 371 U.S. 415 (1963); *Bates* v. *Little Rock*, 361 U.S. 516 (1960)." *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 700. Rather, all that Torres counterposes to the Grand Jury's need to inquire fully concerning her knowledge about terrorist bombings is a perceived "loss of trust and confidence" of her political associates if she testifies before a Federal Grand Jury.

That Torres would lose the trust of her political comrades, who legitimately seek independence for Puerto Rico, by testifying before a Grand Jury about terrorist bombers who have callously taken the lives of four persons and maimed many others requires more than a slight suspension of disbelief. But even assuming there were some truth to Torres' claim, it is nothing short of irresponsible, we submit, to suggest that the Grand Jury's right to question a witness about serious crime ought to turn on the degree of distrust or distaste which the winess' associaes have for the Grand Jury system. It is one thing to argue that available sources of news, or legitimate but controversial political activity, may be stifled by disclosures to an investigative body; it is quite another to argue that a qualified privilege to withhold information should exist for those whose comrades believe that the "prying inquisitor" "sows the seeds of internal discord and mistrust" (Br. at 6).

In light of the legitimacy of the Grand Jury's inquiry and the propriety of at least five of the prosecutor's questions,* Judge Brieant correctly ruled that the witness must testify.**

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* Judge Brieant excused Torres from answering the sixth question which called upon her to identify any person she knows who is a member of or associated with the FALN, finding that question needlessly infringed the witness' First Amendment freedom of association. Although the Government does not quarrel with Judge Brieant's underlying rationale that membership or association with the FALN does not by itself constitute a crime, in the context of this proceeding the Government submits that such an inquiry is entirely appropriate. There is no available evidence that the FALN is a political party. Its only public activities and "political" statements have been its communiques claiming credit for the bombings presently under investigation. As such, there is no more likelihood of an unnecessary infringement of First Amendment freedom of association than there is in an investigation of possible criminal activities carried on by members of a social club. *In re Buscaglia*, 518 F.2d 77, 79-80 (2d Cir. 1975).

** The only case cited by Torres which bears directly upon the relationship of First Amendment rights of association to the needs and duties of the Grand Jury to fully investigate criminal conduct is *United States* v. *Bursey*, 466 F.2d 1059 (9th Cir. 1972). *Bursey*, however, in no way suggests that, when legitimate associational rights are advanced—and none are advanced here—the Government must make a preliminary showing that the witness is possessed of testimony which will assist the Grand Jury. *Bursey*, read most broadly, requires only that the inquiries bear a "substantial connection" to a legitimate investigation and that the means of obtaining the information are "not more drastic than necessary." *Id.* at 1083. Examining each of the criteria set forth in *Bursey*, Judge Brieant found that the Government satisfied each of them in the instant case.

However, by our citation to *Bursey* we do not intend to suggest that we agree with the Ninth Circuit's decision. The original opinion in *Bursey* was issued the day after the Supreme Court's decision in *Branzburg* and plainly failed to consider all of the implications of that decision. The later opinion in *Bursey* denying rehearing appears to retreat somewhat from the earlier opinion, *id.* at 1090-91, but does not, we believe, fairly meet all of *Branzburg's* objections to the obstruction of Grand Jury proceedings.

POINT II

Judge Brieant properly treated the Government's application for immunity as an *ex parte* proceeding.

Torres contends her contempt order should be vacated because the court below treated the Government's application to grant Torres immunity as an *ex parte* proceeding. Her contention is meritless and especially so, since she was in any event permitted to be heard by Judge Brieant.

Section 6003 authorizes a United States Attorney, with approval of the Attorney General or his designate, to request an order of immunity from the court, whenever in his judgment an unwilling witness may have testimony necessary to the public interest. Neither Section 6003 nor Section 6002 provide that notice of such an application must be given to the witness, and these provisions have recently been held by the Fifth Circuit Court of Appeals not to require such notice. *United States* v. *Leyva*, 513 F.2d 774, 776 (5th Cir. 1975). By the same process of reasoning, it has been held that the witness is not entitled under the Sixth Amendment to the assistance of counsel when the Government requests an immunity order. See *In re Kilgo*, 484 F.2d 1215 (4th Cir. 1973); *cf. United States* v. *Handler*, 476 F.2d 709 (2d Cir. 1973).

Torres disputes the soundness of these decisions, claiming that significant legal issues were and could have been raised at that juncture of the proceedings. However, Torres makes no claim that the several legal issues which she raised, or might have raised, when the application for an immunity order was made were not later fully considered when raised as legal arguments for refusing to answer questions before the Grand Jury while

immunized. Rather, Torres claims that she was prejudiced because she had to assert these issues for the first time at a contempt proceeding attendant with the risk of a contempt order should she fail to persuade the court of the validity of her legal position.

This claim of prejudice is specious. Torres makes no showing that any one of the legal issues raised by her at the contempt hearing would have, should have, or could have achieved a different result had they been articulated and considered at the time the Government applied for immunity.* Moreover, as Judge Brieant observed below, it would have been premature to present such issues at any time before a motion for an order of contempt were made. It is only after a witness has refused to obey an order of the court requiring the witness to answer question before a Grand Jury that the witness has any burden to justify a refusal.

In any event, Torres has no cause to complain since, as she concedes in her belief, she was heard by Judge Brieant when the Government presented its application for immunity "as a matter of courtesy." (Br. at 12).

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* Indeed, Torres' claim in this regard is all the less persuasive in light of her counsel's declination to present to Judge Brieant the legal basis for Torres' refusal to testify prior to her final return to the Grand Jury on April 21, 1976:

> "We don't wish to and we decline your offer at this time to present you with reasons why we believe that the witness has rights which are being infringed by the questions and by her appearance. We would prefer to raise those questions at a full hearing, with full opportunity to brief the various questions of law which we believe are serious." (Transcript of April 21, 1976 Proceedings, at 33).

POINT III

The immunity conferred upon Torres will not subject her to prosecution in Puerto Rico.

Torres argues that she properly refused to respond to the Grand Jury's questions, because the immunity conferred upon her did not adequately assure "that her testimony or its fruits [would] not be used against her in a prosecution brought by local authorities under the penal statutes of Puerto Rico." (Br. at 15). This argument is frivolous.

First, it is perfectly clear that the United States Constitution precludes the direct or indirect use of Torres' Grand Jury testimony in any prosecution of her under local Puerto Rican law. Although it is somewhat unclear which of the two Amendments to the Constitution—the Fifth or Fourteenth—would effect this prohibition, see *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 668-69 n.5 (1974); *Farmaris* v. *Ridge Tool Co.*, 400 U.S. 41, 43-44 (1970), there can be no doubt that all of the rights and privileges guaranteed by the Due Process Clauses are applicable to the Commonwealth of Puerto Rico. *Calero-Toledo* v. *Pearson Yacht Leasing Co., supra; Mora* v. *Mejias*, 206 F.2d 377, 382 (1st Cir. 1953) (Magruder, *C.J.*). Since due process protects against infringement of the privilege against self-incrimination, see *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964); *Malloy* v. *Hogan*, 378 U. S. 1 (1964), and a grant of immunity under 18 U.S.C. §§ 6002-03 is necessarily co-extensive with that privilege, *Kastigar* v. *United States*, 406 U.S. 441 (1972),

Torres is fully protected from Commonwealth prosecution by use of her immunized testimony.*

Secondly, even assuming *arguendo* that the Constitution did not preclude use of the immunized testimony in a local Puerto Rican prosecution—a proposition with which we vigorously disagree—, Rule 6(e) of the Federal Rules of Criminal Procedure prevents disclosure of Grand Jury testimony unless otherwise ordered by a District Court, and this bulwark against disclosure is a more than adequate safeguard against the use of Torres' Grand Jury testimony in a local prosecution. See *In re Long Visitor*, 523 F.2d 443, 447 (8th Cir. 1975); *In re Weir*, 495 F.2d 879, 881 (9th Cir. 1974), *aff'g*, 377 F. Supp. 919, 924 (S.D. Cal.), *cert. denied*, *Weir* v. *United States*, 419 U.S. 1038 (1974); *In re Armstrong*, 476 F.2d 313, 316 (5th Cir. 1973); *In re Tierney*, 465 F.2d 806, 811-12 (5th Cir. 1972), *cert. denied*, 410 U.S. 914 (1973); *In re Parker*, 411 F.2d 1067, 1069-70 (10th Cir. 1969), *vacated and remanded for dismissal as moot*, *Parker* v. *United States*, 397 U.S. 96 (1970). But see *In re Cardassi*, 351 F. Supp. 1080, 1082-83 (D. Conn. 1972).

Finally, Torres unfounded surmises concerning local prosecution in Puerto Rico are simply inadequate to preclude the Grand Jury's inquiries. Torres has failed to suggest what local Puerto Rican statute she might be

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* If there were any doubt about the constitutional application of the protections of the privilege against self-incrimination in the local Puerto Rican courts, they are entirely removed by Title 48, United States Code, Section 737, which applies to Puerto Rico and provides in relevant part that

> "*No person shall be held to answer for a criminal offense without due process of law;* and no person for the same offense shall be twice put in jeopardy of punishment, *nor shall be compelled in any criminal case to be a witness against himself.*" (emphasis supplied).

accused of violating as a result of her Grand Jury testimony. An analysis of the questions propounded to Torres makes it abundantly clear that the scope of the Grand Jury's inquiries involve only violations of the laws of the United States or the State of New York, since each and every FALN bombing occurred within the Southern District of New York. The "[r]emote and speculative possibilities" of foreign prosecution asserted by Torres are simply an inadequate basis on which to conclude that her responses might incriminate her under Commonwealth law. *Zicarelli* v. *New Jersey State Commission*, 406 U.S. 478-81 (1972); see *In re Quinn*, 525 F.2d 222, 223 (1st Cir. 1975); *In re Long Visitor*, *supra*, 523 F.2d at 447; *In re Weir*, *supra*, 377 F. Supp. at 924; *United States* v. *Doe*, 361 F. Supp. 226, 227 (E.D. Pa.), *aff'd without opinion*, 485 F.2d 82 (3d Cir. 1973). Compare *In re Cardassi*, *supra*.

POINT IV

Judge Brieant correctly found that the Grand Jury investigation and questioning of Torres were not being misused to assist the FBI in the apprehension of fugitives.

Torres seeks to justify her refusal to answer any questions before the Grand Jury by alleging that the Grand Jury's investigation is being misused by the Government to assist the FBI in the apprehension of fugitives and the gathering of political intelligence concerning the Puerto Rican independence movement. These allegations lack any credible support and were properly rejected by Judge Brieant.

Torres originally moved before Judge Motley to quash the original subpoena issued on January 8, 1976, assert-

ing that the Grand Jury was being misused to assist the FBI apprehend fugitives. After two hearings on February 9 and March 3, 1976, Judge Motley denied Torres' motion, finding that the Grand Jury properly had jurisdiction for an investigation into the whereabouts of fugitives under Title 18, United States Code, Section 1071, forbidding the harboring of fugitives.* Judge Brieant refused to review the correctness of Judge Motley's decision with respect to her refusal to quash the first subpoena served upon Torres, but did find that there was no merit to this contention of Torres as it related to the second subpoena served upon her prior to her appearance before the Grand Jury on April 21, 1976.** Judge Brieant stated:

> "I find no merit whatsoever to this contention. The Assistant United States Attorney has stated in the presence of the foreman of the grand jury whoagreed with his presentations that the grand jury is presently investigating these bombing incidents for violations of Title 18 United States Code, Sections 371, 1842(a)3, 842(j), 844(d), (e), (f), (g) and (i), and Section 1071 and 1361." (Tr. of May 13, 1976 proceedings, at 19).

This finding is clearly correct.

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* As previously recounted in the Statement of Facts, the Government abandoned any reliance on Title 18, United States Code, Section 1073, because the fugitives involved in the Grand Jury's investigation are fugitives from local charges in Puerto Rico arising out of the bombing of five hotels in San Juan.

** Although Torres seeks to relitigate the correctness of Judge Motley's decision refusing to quash the first subpoena, it is clear that that decision simply has no relevance, as Judge Brieant recognized below, on the question of whether Torres had just cause to refuse to obey Judge Brieant's later order requiring her to answer five of the six questions propounded to her before the Grand Jury on April 21, 1976.

There is no factual support whatsoever for the claim that the Grand Jury investigation solely or even primarily concerns a search for fugitives. None of the questions asked of Torres when she appeared before the Grand Jury on April 21, 1976 expressly concerned fugitives. Rather, each of the questions dealt with terrorist bombings.

But even assuming that the Grand Jury's inquiry is attempting to locate fugitives who may have relevant testimony or may become targets of the Grand Jury's investigation, an assumption we freely concede, this assumed state of events could not even remotely be found to exceed the permissible scope of the Grand Jury's investigatory power. The very case on which Torres places her principal reliance, *In re Stolar*, 397 F. Supp. 520 (S.D.N.Y. 1975), held unequivocally that "[a] grand jury may, of course, inquire into 'the whereabouts of unlocated witnesses.' *Hoffman* v. *United States*, 341 U.S. 479, 488 . . . (1951)." 397 F. Supp. at 523. The Court quashed a Grand Jury subpoena in *Stolar* based only on its findings that the information sought from an attorney concerning his client's whereabouts was not needed for the Grand Jury's investigation, but only for the FBI's files. More to the point is Judge Newman's decision in *In re Grusse*, 402 F. Supp. 1232, 1237-38 (D. Conn. 1975), *adopted and aff'd*, *United States* v. *Grusse*, 515 F.2d 157 (2d Cir. 1975), where it was held that a Grand Jury investigation under Section 1071 into the harboring of fugitives was not an abuse because it might lead to evidence of the whereabouts of fugitives.

Torres' argument, at best, is a transparent attempt to tightly compartmentalize Executive and Judicial functions and then argue that, since the FBI—an Executive agency—is primarily concerned with the apprehension of fugitives in furtherance of its duty to prosecute, the

Grand Jury cannot also permissibly inquire concerning the whereabouts of fugitives. The fallacy of this argument is quite plainly that, while the functions of the Executive and Judiciary are not precisely the same, each, in furtherance of their respective duties, may properly inquire concerning the location of fugitives when relevant to their respective functions. Quite obviously, the location of fugitives is not relevant only to the Executive's functions; the Grand Jury may wish to locate a fugitive to obtain testimony or for some other purpose relevant to its traditional and historic role of uncovering criminal wrongdoing.

Torres' further claim that the Grand Jury investigation is being misused to enable the FBI to gather political intelligence on the Puerto Rican independence movement is entirely without support. The questions propounded to Torres do not even touch upon that subject, although undoubtedly such an issue must be touched upon in passing in an investigation such as this where bombings are claimed to be carried out for the express purpose of obtaining political independence for Puerto Rico.*

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* Torres makes another claim that she was subpoenaed solely because she refused to talk to FBI agents, who she alleges would have asked her the identical questions asked of her in the Grand Jury. Even accepting that near telepathic allegation as true, which we do not, the claim does not justify her refusal to answer those same questions before the Grand Jury. *In re Grusse, supra,* 402 F. Supp. at 1238.

POINT V

The Government adequately denied that the questioning of Torres before the Grand Jury was not the product of electronic surveillance.

Torres contends that her refusal to obey Judge Brieant's order to answer the questions propounded to her before the Grand Jury was justified by the inadequacy of the Government's denial that the questions were derived from electronic surveillance. On the contrary, as Judge Brieant found, the Government's denial of any electronic surveillance of Torres was adequate and did not excuse her from obeying the order to answer the questions propounded to her. (Tr. of May 13, 1976 proceedings, at 30-36).

When the Government applied to Judge Brieant on April 21, 1976 for an order of immunity for Torres, she simultaneously moved to have the Government disclose the existence of any electronic surveillance of her or her counsel on telephones and premises in which she purportedly had an interest. Unsparing in her attempt to hamstring the Grand Jury, Torres listed the following as telephones and premises in which she and her counsel claimed an interest and which she claimed the Government was obliged to check for electronic surveillance of her or her counsel:

Lureida Torres
790 11th Avenue
New York, New York
(212) 581-2919

Carlos Varona
790 11th Avenue
New York, New York
(212) 582-5552

Claridad
114 East 13th Street
New York, New York
(212) 674-5440, -5441

Puerto Rican Socialist Party
114 East 13th Street
New York, New York
(212) 260-0150, -0151, -5894, -5929

Jose Antonio Lugo, Esq.
71 Columbia Street
New York, New York
(212) 674-5676

East New York Legal Services Corp.
503 Pennsylvania Avenue
Brooklyn, New York
(212) 385-4045, -4046, -4047, -4065

State University of New York
College at Old Westbury
Office B-11
Old Westbury, Long Island
(516) 876-3103, -3104

Martin R. Stolar, Esq.
350 Broadway (Suite 1207)
New York, New York
(212) 260-2800

Martin R. Stolar
221 West 82nd Street
New York, New York
(212) 724-0665

Center for Constitutional Rights
853 Broadway
New York, New York
(212) 674-3303

National Lawyers Guild
853 Broadway
New York, New York
(212) 260-1360
(212) 673-4970

Glastein, Meyer, Reif
308 Livingston Street
Brooklyn, New York
(212) 858-9131

Grand Jury Project
853 Broadway
New York, New York
(212) 982-3597

Supporting Torres' motion were affidavits of Torres and her attorneys alleging a variety of incidents experienced by them during telephone conversations.*

At Judge Brieant's direction, the Assistant United States Attorney conducting the Grand Jury investigation filed an affidavit that no electronic surveillance of the witness was known to the Assistant United States Attorney, the United States Attorney, his Chief Assistant or the Chief of the Criminal Division. The affidavit further stated that no electronic surveillance of the witness was known to the FBI agent in charge of the FALN investigation. (Affidavit of James E. Nesland, Government's Motion for Contempt, Ex. G). Subse-

* It should be noted that many of the incidents referred to in the affidavits preceded March 3, 1976, the date Torres' motion to quash her original subpoena was denied by Judge Motley and she appeared before the Grand Jury. No motion or request seeking disclosure of electronic surveillance was made at that time, which suggests, we submit, that Torres and her counsel were more interested in raising this spurious issue as late as possible so that this proceeding could continue to be delayed and obstructed.

quently, a second affidavit of FBI agent Butkiewitz was filed stating that no electronic surveillance of Torres was indexed in the central indices maintained by the FBI in Washington, D.C. or the regional indices maintained in New York and Puerto Rico. (Affidavit of Ronald W. Butkiewitz, Government's Motion for Contempt, Ex. H).*

Judge Brieant found that the Government's denial was not only adequate in the context of this Grand Jury investigation but "that further inquiry into possible electronic surveillance in the face of the denials under oath by persons intimately familar with the investigation and by the person who was framing the questions would be both unnecessary and undesirable." (Tr. of May 13, 1976 proceedings, at 35).* That finding by the District Court is fully supported by the record.

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* The electronic surveillance system maintained by the FBI was explained in Agent Butkeiwitz' affidavit. The system indexes the names of any parties to any intercepted conversation and the names of any persons mentioned by any party to an intercepted conversation. (Affidavit of Ronald W. Butkiewitz, Govt's Motion for Contempt, Ex. H).

* The Court went on to say:

> "I rely on the expression of opinion by The Supreme Court of [in] United States against Dionisio, 410 U.S. page 1, 17, and there The Supreme Court opinion says, and I quote, 'Any holding that would saddle a grand jury with minitrials and preliminary showing would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws.'
>
> That is the end of the quotation. And that is what we are not going to have here is threshhold minitrials before the grand jury can do its work.
>
> I believe that the hearings and showings made thus far have been necessary to assure the witness of her rights. I decline to protract these proceedings further by requiring a greater showing on the part of the Government. And the reasons for declining to do so are made all the more poignant in an investigation that involves terrorist bombings and murder." (Tr. of May 13, 1976 proceedings, at 36).

Before turning to Torres' claims respecting the alleged inadequacy of the Government's denial of electronic surveillance, it should be pointed out that Judge Brieant granted the witness more than she was legally entitled to in even requiring the Government to affirm or deny her allegations of electronic surveillance. This Court only recently held in *In re Millow*, 529 F.2d 770 (2d Cir. 1976), that a witness must set forth at least a "colorable claim" of unlawful wiretapping before the Government is required "to disrupt grand jury proceedings and check thoroughly the applicable agency records." *Id.* at 775. Torres' allegations fail to meet even this minimal standard.

Torres' suspicion of electronic surveillance is based upon her single allegation that, since December, 1975, she has heard "clicks," "heavy static" and "echoes" coming over her telephone and has experienced delays in reaching persons called from her telephone. Such alleged incidents are insufficient to require the Government to respond, since they describe nothing more than the ordinary experiences encountered by any telephone user, particularly one living in a large urban area such as New York City. See *In re Vigil*, 524 F.2d 209, 214 (10th Cir. 1975). The telephone incidents complained of by Torres' counsel, furthermore, add nothing of substance to her allegations, since, as more fully set forth hereafter, those alleged incidents occurred during conversations unrelated to Torres and in no way indicated that the Government was conducting electronic surveillance of her.

But, in any event, even assuming *arguendo* that the windmill which Torres erects is sufficient to require the Government to joust with it, the denial of electronic surveillance of Torres was wholly adequate to negative her flimsy allegations and to require her to testify or be held in contempt.

Torres' contention that the Government's response was inadequate because it was not based upon a denial of electronic surveillance by law enforcement agencies other than the FBI and the United States Attorney's office,* and therefore left "wide open the possibility that electronic surveillance took place" (Br. at 29), conveniently overlooks that it is not, and has never been, the Government's obligation to satisfy the witness that he or she has not been the subject of any conceivable electronic surveillance. The Government's burden is limited to satisfying the Court that the Government's questions to the witness are not derived from the results of electronic surveillance. See *In re Buscaglia, supra*, *United States* v. *Grusse, supra*. See also *United States* v. *Van Orsdall*, 521 F.2d 1323, 1325 (2d Cir. 1975); *United States* v. *Toscanino*, 500 F.2d 267, 281 (2d Cir. 1974). As Judge Lumbard observed in his opinion concurring with Judge Timber's opinion for the Court in *Grusse*:

> "It must be remembered that any electronic surveillance by the Government is relevant only if it is somehow used in formulating questions that the grand jury intends to ask. Thus, surveillance conducted by the Government, the results of which were not known to the agents investigating this case, would not be relevant." 515 F.2d at 159.

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* Again, employing their limitless imaginations, Torres, through her counsel, suggests that the following agencies should have been canvassed fo relectronic surveillance of both Torres and her counsel: New York City Police Department; New York State Police Department; Police Department of Puerto Rico; Special Investigation Division of the Department of Justice of Puerto Rico; Bureau of Alcohol, Tobacco and Firearms; Central Intelligence Agency; United States Secret Service; Department of Defense; Customs Bureau; Internal Revenue Service; Postal Service; and the Department of Treasury. (Br. at 25, 28 & n.2).

Here, there can be no doubt that the Government's affidavits conclusively demonstrated that electronic surveillance had not been the basis for the questions put to Torres in the Grand Jury. First, the Assistant United States Attorney categorically stated that nothing used by him to formulate the questions indicated in any way that it might have been derived from intercepted telephone conversations involving Torres. Second, the questions themselves concern facts in the public domain, not private facts or facts suggesting some kind of covert source of information. Finally, Torres herself alleges that she was sought for questioning because her name appeared in an address book belonging to Jose Antonio Castillo-Ayala, a fugitive from the Puerto Rico bombings arrested in Manhattan—a source of information clearly unrelated to electronic surveillance.

Torres argues that more is required of the Government here than a denial by the FBI and the United States Attorney's office, because other law enforcement agencies investigating FALN activities may have supplied information to the FBI in connection with its investigation. This information, Torres speculates, may have been derived from electronic surveillance of her and presented to the FBI and United States Attorney's office in a form disguising its source. Such surmises, clearly theoretical in the face of the Government's affidavits, do not provide just cause for Torres to refuse to testify. In light of "the strong public policy of this Circuit of not permitting disruption of grand jury proceedings absent compelling reasons," *United States* v. *Grusse*, *supra*, 515 F.2d at 158 (Timbers, *J.*), the Government "need not preclude every possibility of taint" before a witness may be compelled to give testimony, particularly in a case of such overriding public importance as this one. *In re Testa*, 486 F.2d 1013, 1017 (3d Cir. 1973), *cert. denied*, *Testa* v. *United States*, 417 U.S. 919 (1974).

Torres also claims that the Government's denial here was inadequate, because, she alleges, the electronic surveillance indices maintained by the FBI are inadequate. The only support for this allegation is a New York Times article and an affidavit of William J. Bender, recounting his experience as defense counsel in *United States* v. *Ahmed*, No. 14, 950 (M.D. Pa.), submitted in support of a defense motion in *United States* v. *Ayers*, No. 48, 104 (E.D. Mich.). Read with due regard for the admitted purpose of the affidavit and the limited knowledge and experience of the affiant, the affidavit suggests little more than that, although the FBI indices contain the names of the telephone subscribers and the names of identifiable persons participating or mentioned in conversations over the telephone, the names of *unidentifiable persons* are not indexed. That that would necessarily be the case hardly seems surprising. Equally obvious, however, is the fact that if Torres were such an unidentifiable person in an intercepted call it is highly unlikely that the conversation would ever come to the attention of the prosecution, let alone be utilized in the preparation of questions for the Grand Jury.

Torres also claims that the Government's affidavits themselves were an inadequate denial of electronic surveillance because they were based upon hearsay and the knowledge of the affiant. As Judge Brieant found, the affidavits were "clear and unambiguous." (Tr. of May 13, 1976 proceedings, at 33). Moreover, this claim is particularly deficient in view of this Court's acceptance of virtually identical affidavits in *United States* v. *Van Orsdell*, *supra*, *In re Buscaglia*, *supra*, and *United States* v. *Grusse*, *supra*.*

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* Torres' argument that the affiants use of the qualification that "to his knowledge" no electronic surveillance of her exists removes the burden of the affiant to be truthful or risk a perjury

[Footnote continued on following page]

Torres argues further that the Government's affidavits failed to deny that her counsel were subjects of electronic surveillance and that Judge Brieant erred in failing to require the Government to remedy that alleged deficiency.* This argument is meritless.

When this contention was raised below, Judge Brieant quite correctly found that any conversations intercepted between Torres and either of her attorneys would appear in the FBI indices, whether intercepted at Torres' premises, counsels' premises or any other premises:

> "If Miss Torres were a participant in any conversations with her attorney, that should have been revealed in the FBI indices." (Tr. of May 13, 1976 proceedings, at 35).

By the same token, any conversation intercepted by either counsel mentioning Torres would likewise appear in the FBI indices. (See Affidavit of Ronald Butkiewitz, Government's Motion for Contempt, Ex. H).

Absent at least some credible suggestion by counsel that Torres' questioning before the Grand Jury appears to be a possible fruit of their conversations, which plainly is not the case, a mere theoretical possibility that elec-

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prosecution is ridiculous. In the first place, Title 18, United States Code, Section 1621, defines perjury as "wilfully" subscribing to a material matter which one "does not believe to be true." More importantly, it would be reckless, and perhaps misleading, for anyone to unequivocally declare that no electronic surveillance of Torres exists. Necessarily, all that can be done to satisfy the Government's legal obligation to affirm or deny the existence of electronic surveillance, short of assigning a team of investigators to gather together, listen and identify every conversation ever electronically intercepted and reported to the FBI in some fashion, is to do what the Government did to satisfy the Court below.

* Torres raises this as Point VI of her brief.

tronic surveillance of conversations involving them were used to question Torres is clearly an insufficient basis to vacate the contempt order. Here, the affidavits of Torres' counsel provide no factual basis for a suggestion that conversations over their telephones concerning Torres were intercepted. Mr. Stolar recounts eight incidents occurring on his telephones in his affidavit. Not one of the recounted incidents, however, allegedly occurred during a conversation in which he discussed matters related to Torres (Affidavit of Martin Stolar, Torres' Motion for Disclosure of Electronic Surveillance). Mr. Lugo recounts five such incidents in his affidavit, but like Mr. Stolar's affidavit, none of the incidents allegedly occurred during a conversation in which he discussed matters related to Torres. But far more significant is the fact that no allegation was made in either affidavit, nor at any hearing below, that any questions asked of Torres appeared to be the result of conversations counsel might have had between themselves or with anyone else.* Thus, Torres fails even to meet the legal standard enumerated in *United States* v. *Alter*, 482 F.2d 1016, 1026 (9th Cir. 1973), which she urges this Court to adopt, since she has failed to "make a *prima facie* showing that good cause exists to believe that the witness' counsel was subjected by someone to illegal surveillance *in connection with the Grand Jury proceeding in which the witness is involved.*" (Emphasis supplied). See *United States* v. *See*, 505 F.2d 845, 856 (9th Cir.), *cert. denied*, 420 U.S. 992 (1974); *United States* v. *Vielguth*, 502 F.2d 1257, 1260 (9th Cir. 1974).

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* The lack of such an allegation distinguishes the situation here from that in *In re Quinn*, 525 F.2d 222 (1st Cir. 1975), cited by Torres. In *Quinn*, one of the questions propounded to the witness before the Grand Jury concerned a telphone conversation with his attorney which, the witness alleged, must have been overheard illegally on the witness' telephone.

Accordingly, Judge Brieant's finding that the electronic surveillance checks adequately safeguarded Torres from any genuine possibility that her questioning was based upon surveillance of her counsel was not erroneous.

It remains only to comment briefly on the nature of the claims of illegality raised in this case. We respectfully submit that too often a claim of illegal electronic surveillance made by a Grand Jury witness is merely a device to obstruct a Grand Jury investigation and to attempt to justify a refusal to testify, the true basis of which has no relationship whatsoever to any claimed electronic surveillance. The Grand Jury's investigation in this case concerns the most callous of criminal conduct —terrorist bombings of public places which have resulted in the loss of innocent lives. To avoid providing testimony which may lead to the apprehension of those who have engaged in this conduct in the past and may well engage in it again, Torres has raised claims of electronic surveillance which are without the slightest factual basis. Her claims, we respectfully submit, should be promptly and categorically rejected.

CONCLUSION

The judgment of contempt should be affirmed.

Respectfully submitted,

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United States Attorney for the Southern District of New York, Attorney for the United States of America.

JAMES E. NESLAND,
LAWRENCE B. PEDOWITZ,
Assistant United States Attorney, Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JAMES E. NESLAND being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 28th day of May , 1976, he served a copy of the ~~within~~ brief ~~by placing the same in a properly postpaid franked envelope addressed:~~ in United States v. Lureida M. Torres, Dkt. No. 76-1266 by hand upon Jose Antonio Lugo, Esq., co-counsel for Lureida M. Torres, at the office of Martin Rl Stolar, Esq. 350 Broadway, New York, New York.

~~And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.~~

James E. Nesland

Sworn to before me this

2nd day of June 1976

Jeanette Ann Grayer

JEANETTE ANN GRAYER
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977